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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

**IN RE TRANSPACIFIC PASSENGER
AIR TRANSPORTATION
ANTITRUST LITIGATION**

Master File No. C 07-5634 CRB

MDL NO. 1913

This Document Relates To:

CLASS ACTION

ALL ACTIONS

**DEFENDANT ALL NIPPON
AIRWAYS CO., LTD'S OPPOSITION TO
PLAINTIFFS' ADMINISTRATIVE
MOTION REGARDING TRIAL
SCHEDULE AND CLASS NOTICE
PROGRAM**

Judge: The Honorable Charles R. Breyer

1 On August 24, 2018, Plaintiffs filed an Administrative Motion Regarding Proposed Trial
2 Schedule and Class Notice Program (ECF No. 1231). Defendant All Nippon Airways Co., Ltd.
3 (“ANA”) agrees with almost the entirety of the trial schedule laid out in Plaintiffs’ motion.
4 However, ANA opposes two items which unduly burden ANA and the Court or which do not
5 accord with the Civil Local Rules. ANA also objects to Plaintiffs’ class notice program and
6 notice forms.

7 First, the schedule for merits expert reports sensibly should be that the party bearing the
8 burden of proof on a claim or defense should submit its expert report(s) bearing on that claim or
9 defense before the other party’s rebuttal expert report. Plaintiffs’ proposal—that each side guess
10 what the other’s expert will opine, and submit its rebuttal on the same day—is unduly
11 burdensome and inefficient. It would require each side to submit two expert reports instead of
12 one: one report addressing what each side guesses the other’s expert will say; and a second
13 report responding to what the other’s expert actually says.

14 Second, ANA does not agree to Plaintiffs’ elimination of replies to oppositions to
15 motions in limine.

16 Third, Plaintiffs’ counsel’s class notice program is misleading and exhibits improper
17 gamesmanship. Plaintiffs’ counsel has repeatedly argued to this Court that the passenger-
18 plaintiffs are the direct purchasers from the airlines, and that travel agents are not: “You have
19 the fact that travel agents don’t purchase airline tickets at all.”; “THE COURT: . . . [I]s there
20 circuit law that supports the proposition that the travel agents or people similarly situated as
21 travel agents wouldn’t have a direct purchaser claim? MR. ZAPALA: Yes.” (Jun. 15, 2018,
22 Hr’g Tr. 19:05-06, 42:21-43:03.) This Court accepted that argument in denying ANA’s motion
23 for summary judgment that passengers who purchased through travel agents were indirect
24 purchasers from the airlines. Yet now Plaintiffs’ counsel intend to send their proposed class
25 notice to travel agencies as direct purchasers, giving the lie to their argument on summary
26 judgment. Plaintiffs’ notice also misleads class members, improperly implying liability by
27 associating both the Japan Class and the Satogaeri Class with ANA’s plea agreement.
28

1. On the date for opening expert reports, the party bearing the burden of proof on a claim or defense should submit its expert report(s) bearing on that claim or defense.

Plaintiffs have the burden of proving liability and damages, and may submit an expert report containing economic theories and evidence. In order to prepare an informed and comprehensive response, ANA needs to know Plaintiffs' expert's theories and on what evidence Plaintiffs' expert relies. It would be unduly burdensome and inefficient for ANA to guess the contents of Plaintiffs' expert report(s) and submit a response(s) which could be off-point to the extent ANA guesses wrong or which would add nothing to the extent ANA guesses right, because, under Plaintiffs' proposal, ANA would submit a rebuttal anyway after receiving Plaintiffs' report(s).

In *Plumbers & Pipefitters Local 572 Pension Funds v. Cisco Systems, Inc.*, 2005 WL 1459572 (N.D. Cal. Jun. 21, 2005), simultaneous disclosure was found to prejudice the party without the burden of proof, as a "needless waste of resources" inasmuch as "Defendants would have to respond to all of Plaintiffs' possible theories" instead of focusing on the actual "theories relied upon by Plaintiffs." *Id.* at *2. The Advisory Committee Notes to the 1993 amendments to Federal Rule of Civil Procedure 26(a)(2) also state, "In most cases the party with the burden of proof on an issue should disclose its expert testimony on that issue before other parties are required to make their disclosures with respect to that issue."

Here, Plaintiffs' proposed simultaneous exchange would result in exactly the "needless waste" which should be avoided. Instead, Plaintiffs should serve their merits expert report(s) on November 5, 2018, and ANA should serve its rebuttal expert report(s) on December 31, 2018. That eliminates the inefficient and costly requirement that ANA first speculate and respond to what it thinks Plaintiffs' economic theories will be before subsequently drafting an additional response once Plaintiffs' actual theories are known. ANA's expert report(s) on ANA's affirmative defenses should also be due on November 5, with Plaintiffs' rebuttal(s) due on December 31.

1 In the alternative, ANA would agree to serving its rebuttal report on November 5 if the
 2 Court limits Plaintiffs to Dr. Mangum's existing class report without modification. That would
 3 eliminate the need for guesswork in ANA's rebuttal, and would be efficient.

4
 5 **2. The parties should be afforded replies on motions in limine, consistent with the
 Civil Local Rules.**

6 The parties have agreed to exchange motions in limine on December 17, 2018.
 7 Consistent with Civil Local Rules 7-3(a) and 7-3(c), ANA proposes 14 days to oppose and 7
 8 days to exchange replies. Plaintiffs have proposed 21 days to exchange oppositions and the
 9 elimination of replies altogether.

10 Given the availability of time to fully brief each motion, ANA can find no reason to
 11 deviate from the rules. ANA should be afforded a full opportunity to reply to any issue raised in
 12 Plaintiffs' opposition briefs. Additionally, Plaintiffs will face no prejudice as they have already
 13 contemplated the entire briefing schedule to total three weeks. Therefore, in accordance with the
 14 Local Rules, ANA proposes the exchange of opposition briefs on December 31, 2018, and the
 15 exchange of reply briefs on January 7, 2019.

16 **3. Plaintiffs' Class Notice Program is misleading and should be rejected.**

17 Plaintiffs' improper class notice misleads its audience and contains statements which
 18 contradict the holdings of this Court.

19 First, the notice should not be sent to travel agencies as stated in paragraph 15.d of the
 20 Wheatman Declaration. This Court has held that the plaintiff-passengers are the direct
 21 purchasers on behalf of similarly situated passengers, in reliance on Plaintiffs' counsel's repeated
 22 argument that passengers are direct purchasers and travel agents are not. There are no travel-
 23 agent plaintiffs representing any class of travel agents. Sending the notice to travel agents would
 24 mislead them into thinking that their claims are being adjudicated.

25 Second, the notice should not refer to ANA's plea agreement. Plaintiffs have not
 26 established that the plea agreement concerns either the Japan Class or the Satogaeri Class. As
 27 the notice properly states, "The Court has not decided that ANA did anything wrong; rather, the
 28

case is currently scheduled to go to trial.” Referring to the plea agreement would give class members the misimpression that the plea agreement establishes liability or otherwise strengthens Plaintiffs’ case.

Third, Exhibit 4 to the Wheatman Declaration states, in the second bullet point on page 1, “Lawsuits involving the price of transpacific airline tickets have been settled....” The bullet point incorrectly refers to multiple “lawsuits.” It should be corrected to read, “The lawsuit involving the price of transpacific airline tickets has been settled....” That accords with the third bullet point, “The lawsuit is continuing against the remaining defendants”

ANA also objects to the improper use of an administrative motion for approval of class notice. Civil Local Rule 7-11 provides that a motion for administrative relief is appropriate for resolving “miscellaneous administrative matters, not otherwise governed by a federal statute, Federal or local rule, or standing order.” Plaintiffs’ request for approval of class notice is governed by Federal Rule of Civil Procedure 23(c)(2), and therefore not properly made via administrative motion. ANA requests a hearing on its objections to the notice, on September 14, 2018, when the Court has scheduled the final-approval hearing on the other Defendants’ settlements. Absent that, Plaintiffs’ class notice program should be rejected.

CONCLUSION

For the foregoing reasons, ANA respectfully requests the Court to approve ANA’s annexed Proposed Order Setting the Trial Schedule. ANA also requests that Plaintiffs’ class notice program be rejected or, in the alternative, that the Court schedule a hearing on ANA’s objections to the notice on September 14, 2018.

Dated: August 28, 2018

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